Supreme Court, U.S.
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No. 92-352

In the Supreme Court of the United States

OCTOBER TERM, 1992

JASON W. NOVAK, PETITIONER

v.

ANDERSEN CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), can include an award of monetary relief to compensate a participant in an ERISA plan for tax losses caused by the plan administrators' violation of the terms of the plan.

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This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Petitioner was an employee of respondent Andersen Corporation.[1] After he voluntarily terminated his employment, he elected to receive a cash distribution of all benefits he had accumulated in respondent Andersen Corporation Employee Stock Ownership Plan, a plan covered by the Employee Retirement Income Security

[1] The lower courts decided this case on respondents' motion for summary judgment and therefore the evidence and inferences should be viewed in a light most favorable to petitioner. See Pet. App. A14.

Act of 1974 (ERISA). The plan distributed funds to him on two occasions: he received $84,637 on June 29, 1987, and $3,199.54 on February 2, 1988. The plan did not notify petitioner that the funds had to be transferred to an eligible retirement plan within 60 days in order to qualify for federal income tax deferral under 26 U.S.C. 402(a)(5). Under 26 U.S.C. 402(f), the administrators of the plan were required to give petitioner that notice (generally referred to as a rollover notice). Petitioner did not transfer any portion of the funds into an eligible retirement plan within 60 days, and he accordingly became obligated to pay federal income tax on the entire amount of the distributions. Pet. App. A3-A4, A12-A13.

2. Petitioner subsequently filed suit against respondents in the United States District Court for the District of Minnesota. He contended that respondents' failure to send the rollover notice violated Section 3.9 of the plan, which provided that the plan's administrators "shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall * * * distribute the same as so required." See Pet. App. A3-A4. Petitioner sought compensation for the tax losses he incurred because of his failure to transfer the benefits in accordance with 26 U.S.C. 402(a)(5). Petitioner contended that the relief he sought was available under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), as "appropriate equitable relief * * * to redress" the violation of the plan.

The district court granted summary judgment in favor of respondents. Pet. App. A11-A21. The court stated that five courts of appeals have concluded that compensatory relief is not "appropriate equitable relief" available under Section 502(a)(3) of ERISA,[2] and that only the

[2] The court cited *Drinkwater* v. *Metropolitan Life Insurance Company*, 846 F.2d 821 (1st Cir.), cert. denied, 488 U.S. 909 (1988);

Sixth Circuit, in *Warren* v. *Society National Bank*, 905 F.2d 975 (1990), cert. denied, 111 S. Ct. 2256 (1991), had reached the opposite conclusion. Pet. App. A19-A20. Without any independent reasoning, the court followed "the greater weight of authority" and "decline[d] to follow the Sixth Circuit." *Id.* at A20. Hence, the district court granted summary judgment for respondents. *Ibid.*[3]

3. A divided panel of the court of appeals affirmed. Pet. App. A1-A10.

a. Because the court assumed, "without deciding," Pet. App. A4, that the failure to send the rollover notice violated the plan, the only issue before the court was whether the relief sought by petitioner was available under Section 502(a)(3). On that question, the court concluded that the reference to "other appropriate equitable relief" in Section 502(a)(3) refers only to "declaratory or injunctive relief." Pet. App. A6-A7. The court noted that a Senate Report considering a predecessor to ERISA had listed injunctions, declaratory relief, and imposition of a constructive trust as examples of relief that would have been available under the proposed statute, and suggested that the absence of a reference in the legislative history to compensatory relief supported its interpretation of the statute as enacted. *Id.* at A7.

Powell v. *Chesapeake and Potomac Telephone Company*, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); *Kleinhans* v. *Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); and *Sokol* v. *Bernstein*, 803 F.2d 532 (9th Cir. 1986).

[3] Because the district court granted summary judgment on the compensatory relief issue, it had no occasion to consider the validity of respondents' contention that they had not violated the plan in any event, because Section 3.9 of the plan did not require distribution of the rollover notice. Pet. App. A16-A18.

The court of appeals also relied on this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), which held that similar relief was not available under Section 502(a)(2) of ERISA. Although the court acknowledged that *Russell* interpreted a different provision of ERISA, it nevertheless "f[ou]nd its analysis persuasive under § 502(a)(3)(B)." Pet. App. A8.

The court also "decline[d] to adopt the reasoning of the Sixth Circuit" in *Warren*. Pet. App. A8. The court explained that "[d]amages are damages, and an award of damages is a legal, not an equitable, remedy." *Id.* at A9. The court further stated that it would not have awarded relief in this case even if it were willing to follow the Sixth Circuit and award damages in some situations. In its view, *Warren* was a case in which the beneficiary was denied his right to "an actual benefit he was entitled to under the plan"—in that case, a single-sum distribution. In this case, the court reasoned, petitioner received all the benefits to which he was entitled under the plan. Pet. App. A9.

b. Judge Stuart dissented. Pet. App. A9-A10. He relied principally on the portion of Section 502(a)(3) that states that "appropriate equitable relief" should be granted to "redress" violations of the plan. Because the word "redress" means "compensate," he agreed with the Sixth Circuit that the provision should be construed to include compensatory relief. Pet. App. A10.

4. The court of appeals originally entered judgment on April 9, 1992. See Pet. App. A2. Petitioner subsequently filed a document styled "Petition for Rehearing En Banc," which the court of appeals denied on May 29, 1992. Pet. App. A22. Because the document constituted a

petition for rehearing under the Eighth Circuit's rules,[4] the petition for a writ of certiorari filed on August 26, 1992, was timely.[5]

DISCUSSION

On the merits, we agree with petitioner that the court of appeals erred in holding that the "appropriate equitable relief" available under Section 502(a)(3) of ERISA can never include compensatory damages. We also agree with petitioner that the courts of appeals have reached conflicting results on that question. Nevertheless, because the Court's disposition of *Mertens* v. *Hewitt Associates*, No. 91-1671 (argued Feb. 22, 1993), might clarify

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[4] See 8th Cir. R. 35A(c)(4) ("All suggestions for rehearing en banc, no matter how styled, shall be deemed to include both a petition for rehearing by the panel that decided the case and a suggestion for rehearing en banc."), 40A(b)(2) ("Every petition for rehearing en banc * * * shall automatically be deemed to include a petition for rehearing by the panel."). It is clear that the court of appeals followed this rule, because the May 29, 1992, order rejecting the petition explicitly refers to the document as including a petition for rehearing. See Pet. App. A22 ("The petition for rehearing is * * * denied.").

[5] Respondents suggest (Br. in Opp. 3 n.2) that the petition for a writ of certiorari was not filed in a timely manner, because the petition for a writ of certiorari was filed more than 90 days after the original judgment. But the document petitioner filed constituted a petition for rehearing for purposes of this Court's Rule 13.4, which thus extended the time for filing the petition for a writ of certiorari. Under *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), the courts of appeals have considerable discretion to determine whether to treat a particular document as a petition for rehearing, and the treatment they give the document at the time they receive it generally will be accepted as dispositive of the question by this Court. See *id.* at 47-49 (concluding on the facts of that case that a document styled "Petition for Rehearing En Banc" constituted a petition for rehearing). This Court should treat the petition for a writ of certiorari as timely in light of the court of appeals' characterization of the document in question.

the governing legal principles, we do not believe it is necessary for the Court to grant plenary review at this time.

1. The issue in this case is whether a court's authority to award "appropriate equitable relief * * * to redress" a violation of the terms of an ERISA plan includes authority to award compensatory relief. As we argued in our brief on the merits in *Mertens*, it does. See Gov't Br. at 10-20, *Mertens* [hereinafter *Mertens* Br.].[6] As we explained there, courts should refer to the general principles courts of equity applied in trust cases to determine what types of "equitable relief" are "appropriate" to "redress" violations of ERISA plans. See *id.* at 10-11. Under those principles, make-whole monetary relief was a traditional equitable remedy. See *id.* at 12-14. Although the factual basis for the claim in this case differs from that asserted in *Mertens*, the same legal principle governs: Congress authorized federal courts to provide beneficiaries compensatory relief available under common-law equitable principles.[7]

Common-law equitable principles establish here—as they do in *Mertens*—that make-whole relief was available in a case like this one, an action by a beneficiary seeking compensation for damages incurred because of a fiduciary's failure to comply with the terms of the trust instrument. Section 199(c) of the Restatement of Trusts provides that one of the "equitable remedies of [a] beneficiary" is a suit "to compel the trustee to redress a breach of trust." 1 Restatement (Second) of Trusts 437

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[6] We have provided counsel for the parties with copies of our brief on the merits in *Mertens*.

[7] In *Mertens*, plan beneficiaries seek damages, on behalf of a plan, to compensate the plan for losses incurred as a result of a nonfiduciary's knowing participation with a fiduciary in a breach of fiduciary duty.

(1959) [hereinafter Restatement]. Moreover, comment a to Section 205 (the provision setting forth the nature of remedies available in a suit described in Section 199 of the Restatement), explains that the remedy is designed to "put [the beneficiary] in the position in which he would have been if the trustee had not committed the breach of trust." 1 Restatement, *supra*, at 458. Finally, it is clear that the remedy includes not only a right to wrongfully withheld benefits, but a right to consequential damages like the damages sought in this case. See George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 701, at 198 (2d ed. rev. 1982) ("Both direct and consequential damages may be awarded."); see also Restatement (Third) of Trusts § 205 app. comment a, at 223 (1990) ("If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach."). Accordingly, because a court of equity would have awarded petitioner the relief sought in this case, that relief should be "appropriate equitable relief" for purposes of Section 502(a)(3) of ERISA.

Moreover, because ERISA would preempt a state-law action that allowed a damages recovery based on a violation of an ERISA plan, the court of appeals' interpretation of Section 502(a)(3) in this case would contradict the policy of ERISA by leaving beneficiaries with less effective remedies than those available to them before ERISA was enacted. See *Mertens* Br. 16-18; compare *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) ("ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans.") (internal quotation marks omitted). Finally, our reading of Section 502(a)(3) is

confirmed by the civil penalty provision in Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. III 1991), which provides for a civil penalty based on the "amount * * * to be paid * * * participants and beneficiaries" in a civil action, and therefore rests on the premise that Section 502(a)(5)—a counterpart to Section 502(a)(3) with the same operative language—allows compensatory monetary relief. See *Mertens* Br. 18-20.[8] For those reasons, we disagree with the conclusion of the court of appeals that Section 502(a)(3) does not authorize an award of compensatory monetary relief.

2. The decision of the court of appeals conflicts with the decision of the Sixth Circuit in *Warren* v. *Society National Bank*, 905 F.2d 975 (1990), cert. denied, 111 S. Ct. 2256 (1991). In *Warren*, the beneficiary suffered adverse tax consequences in connection with his withdrawal from an ERISA plan because the trustee (in violation of the terms of the plan) failed to distribute all of the funds due to the beneficiary within a single calendar year. See 905 F.2d at 976. Dr. Warren sought damages as compensation for the resulting tax losses. The *Warren* court concluded that such damages were available under Section 502(a)(3) of ERISA, reasoning that it should interpret the provision in light of the law

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[8] Respondents suggest (Br. in Opp. 5) that Congress's reference to both "equitable" and "legal" relief in Section 502(g)(2) of ERISA, 29 U.S.C. 1132(g)(2), undermines our view that Section 502(a)(3)'s reference to "equitable" relief encompasses the broad range of remedies available in trust cases in courts of equity. Respondents fail to note, however, that Section 502(g)(2) provides remedies not only for failure to comply with a trust instrument, but also for failure to comply with a collective bargaining agreement. Because the collective bargaining agreement is not itself a trust document, Congress reasonably might have thought that ordinary contractual remedies for a breach of that document would be characterized as "legal," rather than "equitable," relief.

of trusts, and that under trust law "a beneficiary is entitled to a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust." 905 F.2d at 981 (quoting *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 157 n.16 (1985) (Brennan, J., concurring) (internal quotation marks omitted)). Because the damages sought by Dr. Warren were designed to put him in the position in which he would have been if the trustee had complied with the terms of the trust, the court concluded that the damages were "appropriate equitable relief" available under Section 502(a)(3) of ERISA. 905 F.2d at 981-982.

The analysis of the court of appeals in this case is contrary to the analysis of the Sixth Circuit in *Warren*. The court here concluded that the relief sought by petitioner was unavailable because Section 502(a)(3) allows only "declaratory or injunctive relief," Pet. App. A7, and rejected petitioner's reliance on *Warren* with the explanation that "[d]amages are damages, and an award of damages is a legal, not an equitable, remedy," Pet. App. A9; see *id.* at A8 ("[W]e decline to adopt the reasoning of the Sixth Circuit on this issue."). It seems clear that petitioner would have prevailed under the reasoning the Sixth Circuit applied in *Warren*,[9] and just

[9] We do not understand the suggestion of the court of appeals that its reasoning could be reconciled with *Warren* on the theory that Dr. Warren differed from petitioner in that Dr. Warren "was denied an actual benefit he was entitled to under the plan," Pet. App. A9. If the court used the term "actual benefit" to refer to the payment of the total monetary benefits due under the plan, then both petitioner and Dr. Warren received all the "actual benefit" due under the plan. See 905 F.2d at 976 (describing disbursement to Dr. Warren of benefits owed to him). On the other hand, if the court used the term to suggest that Dr. Warren was denied some nonmonetary benefit to which he was actually entitled under the plan (such as the right to have a lump-sum

as clear that Dr. Warren would not have prevailed under the reasoning applied by the court of appeals in this case.[10]

Respondents suggest (Br. in Opp. 8-12) that the decision of the Sixth Circuit in *Warren* is an anomaly because the overwhelming majority of the courts of appeals agree with the decision in this case. Although we agree that two of the other courts of appeals have held that compensatory damages are not available under Section 502(a)(3), see *Harsch* v. *Eisenberg*, 956 F.2d 651, 656-660 (7th Cir.), cert. denied, 113 S. Ct. 61 (1992); *Drinkwater* v. *Metropolitan Life Insurance Company*, 846 F.2d 821, 824-825 (1st Cir.), cert. denied, 488 U.S. 909 (1988), we do not believe the split is as one-sided as respondents suggest. Unlike this case and *Warren*, all of the other decisions on which respondents rely involve claims for punitive damages or emotional distress that would not ordinarily have been available in a common-law contract action.[11] Because the remedies available in

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distribution), then Dr. Warren was in no different posture than petitioner, who has alleged that respondents denied him his right under the plan to receive certain notices in connection with his distribution.

[10] In response to the Court's request that the Solicitor General express the views of the United States, the government filed a brief arguing that the decision in *Warren* was correct, and that it was not necessary for the Court to grant the petition in that case because of the lack of a well-developed conflict on the question at that time. See Gov't Br., *Warren*, No. 90-870 (O.T. 1990).

[11] See *McRae* v. *Seafarers' Welfare Plan*, 920 F.2d 819, 820 (11th Cir. 1991) (damages for emotional distress, embarrassment, humiliation, and damage to financial reputation); *Varhola* v. *Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (punitive damages); *Kleinhans* v. *Lisle Sav. Profit Sharing Trust*, 810 F.2d 618, 626-627 (7th Cir. 1987) (punitive damages); *Sokol* v. *Bernstein*, 803 F.2d 532, 534-539 (9th Cir. 1986) (emotional distress); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793

equity for a breach of trust closely followed the remedies that would have been available for a breach of contract in a court of law,[12] those cases are not directly analogous to this one.

3. Given the obvious importance of the question presented by the petition—which involves a basic issue about the scope of one of the cornerstones of ERISA's remedial framework—and the existence of a conflict in the circuits, we believe that the question presented in the petition ordinarily would merit plenary review by this Court. Because of the pendency of *Mertens*, however, we do not believe review is necessary at this time.[13]

F.2d 1456, 1462-1465 (5th Cir. 1986) (punitive damages), cert. denied, 479 U.S. 1034 (1987); *Powell* v. *Chesapeake and Potomac Telephone Company*, 780 F.2d 419, 424 (4th Cir. 1985) (punitive damages and damages for emotional distress), cert. denied, 476 U.S. 1170 (1986).

[12] See, *e.g.*, 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 n.15 (Spencer W. Symons 5th ed. 1941) (explaining that the equitable liability for breach of trust is "of the same nature as that arising from breach of contract"); *Mertens* Br. 13-14 & n.17.

[13] Respondents also identify another potential problem with the case by noting (Br. in Opp. 12-16) that the lower courts have not yet determined whether the facts alleged by petitioner would constitute a breach of the plan; instead, those courts proceeded on the assumption that petitioner had alleged a violation and disposed of the case on that basis. See Pet. App. A4 (court of appeals "assume[d] without deciding that this failure to give notice was a breach of the Plan"), A18 (district court determined that it did not "need [to] reach these issues because [respondents] are entitled to summary judgment on [the Section 502(a)(3) ground presented in the petition]"). Because that claim apparently was preserved in the court of appeals and in the brief in opposition, it would be properly before the Court if the Court were to grant review in this case. Accordingly, even if the Court granted review in this case, it

It is quite possible that the view this Court takes of the analysis of the court of appeals will be affected by this Court's disposition of *Mertens* v. *Hewitt Associates*, No. 91-1671. As we stated above, we have argued in that case that Section 502(a)(3) authorizes federal courts to award compensatory relief to redress violations of ERISA and ERISA plans. If the Court accepts that submission and reverses the judgment of the Ninth Circuit in that case, the opinion may cast considerable doubt on the validity of the court of appeals' analysis in this case. Accordingly, the Court at that time might wish to grant the petition in this case, vacate the judgment of the court of appeals, and remand for further consideration in light of *Mertens*. Similarly, if the Court were to reject our submission in *Mertens* and affirm the judgment of the Ninth Circuit in that case, the opinion—depending on its rationale—could cast considerable doubt on the validity of the analysis of the Sixth Circuit in *Warren*. In that event, the Court might wish to deny the petition in this case and await further developments.

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could affirm the judgment of the court of appeals without considering the important question presented by the petition.

Of course, the Court would have discretion if it granted the petition to decline to consider whether the facts alleged by petitioner are sufficient to constitute a violation of the plan. In our view, such a course would be entirely appropriate. Neither of the lower courts have addressed the question, compare *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), and the district court's opinion suggested considerable reluctance to dispose of the question without allowing further discovery by petitioner. Respondents have not suggested any reason why the Court would wish to depart from its usual practice and consider that question without the benefit of prior consideration by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's disposition of *Mertens* v. *Hewitt Associates*, No. 91-1671.

Respectfully submitted.

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